FOR ARGUMENT

No. 92-1956

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In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents attempt to defend on three basic grounds the expansive foreseeability test adopted by the court of appeals – a test under which any railroad employee who experiences stress from general working conditions may state a claim for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"). Respondents: (1) point to the "broad remedial purpose" of the FELA as justification for the judicial creation of a test for negligent infliction of emotional distress under the FELA that is broader than any test

generally recognized at common law; (2) attempt to discredit the well-established common law policies supporting restrictions on the tort of negligent infliction of emotional distress and their applicability to the FELA; and (3) defend the court of appeals' decisions by asserting that they are well-grounded in the common law, a proposition that the court of appeals itself rejected. Respondents' arguments are unconvincing for several reasons.

First, the broad remedial purpose of the FELA does not and cannot alone provide a meaningful basis for decision in these cases. Other countervailing policies strongly counsel against exposing an FELA employer to virtually unlimited liability for the general stresses of inherently stressful jobs.

Second, the policy considerations that have convinced virtually every common law court to place limits on causes of action for negligent infliction of emotional distress remain viable and are equally (and in some instances more) applicable to the FELA.

Third, respondents could not recover for their emotional distress at common law, and, accordingly, their attempts to defend the court of appeals' decisions, if not their reasoning, on common law grounds are unfounded. Indeed, respondents' efforts in this regard are indicative of their own implicit concern that the court of appeals' broad foreseeability test is unsupportable and unworkable.

ARGUMENT IN REPLY

I. THE BROAD REMEDIAL PURPOSE OF THE FELA DOES NOT JUSTIFY THE COURT OF APPEALS' ADOPTION OF AN EXPANSIVE FORESEEABILITY TEST FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

To defend the court of appeals' adoption of an expansive foreseeability test for negligent infliction of emotional distress,[1] both Gottshall and Carlisle emphasize the "broad remedial purpose" of the FELA. *See, e.g.*, Gottshall Brief at 12-13; Carlisle Brief at 9-11. That rationale does not, however, automatically justify imposing a new duty on FELA employers to protect their employees from emotional distress. Rather, as discussed in Conrail's opening brief, the broad remedial purpose of the FELA was to make whole the victim of the physical dangers of railroad work.

Indeed, important countervailing policies counsel against creating a broad tort duty under which virtually any railroad worker might state a claim for workplace stress. These policies include the complete lack of statutory support suggesting that Congress intended to impose on FELA employers a duty to protect their employees from emotional distress; the far-sweeping effect such a duty would have on the employment relationship; and the availability of other congressional remedies, such as the Railway Labor Act ("RLA"), to

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[1] While the court of appeals' test for negligent infliction of emotional distress requires genuineness in addition to foreseeability, Conrail Brief at 22-24, given the relative ease of demonstrating genuine emotional distress, even Gottshall refers to the approach of the court of appeals as a "foreseeability-based approach." *See* Gottshall Brief at 43.

address working conditions in the railroad industry. Focusing solely on the undifferentiated "broad remedial purpose" of the FELA, respondents ignore these other policies entirely.

In the context of other federal statutes, this Court has cautioned that "the creation of new rights ought to be left to legislatures, not courts." *Musick, Peeler & Garrett v. Employees Ins.*, 113 S. Ct. 2085, 2088 (1993). Moreover, the Court explicitly has held that generalized references to the broad remedial purpose of a statute – such as those advanced by Gottshall and Carlisle – do not "justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.' " *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (quoting *SEC v. Sloan*, 436 U.S. 103, 116 (1978)); *see also Aaron v. SEC*, 446 U.S. 680, 695 (1980).

The statutory language and the legislative history of the FELA discussed in Conrail's brief on the merits, *see* Conrail Brief at 12-13; 16-19, make clear that Congress enacted the FELA because of its concern with the physical dangers of railroading. The statute removed certain specific common law defenses (such as assumption of the risk) in order to broaden railroad workers' remedies for physical injuries, but there is no evidence whatsoever either in the language of the statute or in its legislative history that Congress intended to impose a new and expansive tort duty on FELA employers to protect their employees from emotional distress. In the absence of clear congressional intent, it would be particularly inappropriate to impose a broad tort duty in the employment relationship, particularly an employment relationship regulated by Congress through another federal statute, the RLA.

Indeed, although Gottshall points to decisions in Virginia and Ohio as applying expansive remedies for negligent infliction of emotional distress, *see* Gottshall Brief at 22-23, those very states disallow recovery for negligent infliction of emotional distress in employment cases. *See Chesapeake & Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 365 S.E.2d 751 (1988); *Penn v. Rockwell Int'l Corp.*, 48 Fair Empl. Prac. Cas. (BNA) 624 (S.D. Ohio 1988); *Oldfather v. Ohio Dep't of Transp.*, 653 F. Supp. 1167 (S.D. Ohio 1986), *appeal dismissed*, 816 F.2d 681 (6th Cir. 1987).

Unlike the doctor-patient relationship, in which some courts have found that a doctor owes a duty to a patient to avoid causing emotional distress, *see infra* pp. 18-19, the employment relationship is not one where such a duty should be imposed without clear congressional guidance. As the California Supreme Court noted with respect to the question of whether tort remedies should be interposed into the employment relationship, "[s]uch a determination, which has the potential to alter profoundly the nature of employment, the cost of products and services, and the availability of jobs, arguably is better suited for legislative decision making." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 694, 765 P.2d 373, 397, 254 Cal. Rptr. 211, 235 (1988); *see also Soules v. Cadam Inc.*, 2 Cal. App. 4th 390, 404, 3 Cal. Rptr. 2d 6, 14 (1992); *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wash. 2d 426, 447-48, 815 P.2d 1362, 1373-74 (1991). Despite their persistent references to the "broad remedial purpose" of the FELA, neither Gottshall nor Carlisle is able to demonstrate that this quantum leap in the law was one intended by Congress.

Moreover, in the railroad industry Congress expressly has provided a forum for the airing of disputes

concerning working conditions, rendering the imposition of liability for workplace stress even more inappropriate. As Gottshall concedes, "[r]ailroad employees upset with general working conditions, disagreements with superiors and other such routine matters have a ready forum [under the Railway Labor Act] within which to air their grievances." Gottshall Brief at 44; *see also* Conrail Brief at 27-30. The problem with the court of appeals' approach is that it essentially *invites* railroad employees "upset with general working conditions, disagreements with superiors and other such routine matters" to avoid resolving those disputes under the RLA by bringing negligent infliction of emotional distress claims under the FELA.

Conrail's argument is not, as respondent Carlisle suggests, *see* Carlisle Brief at 26, that the RLA bars employee claims for emotional distress. Conrail recognizes that in some situations a cause of action for emotional distress may exist under the FELA. *See Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987). Conrail's point is only that in defining the parameters of such a cause of action, this Court should take into consideration the availability of the RLA procedures also provided by Congress, just as it should take into account the other policies set forth above and in Conrail's opening brief.

Contrasted with the expansive foreseeability test adopted by the court of appeals and urged by Gottshall and Carlisle, the zone of danger test advanced by Conrail takes into account the remedial purpose of the FELA, the duty imposed by Congress under the FELA, and the nature of the railroad employment relationship. Congress clearly intended to impose a duty on railroad employers to protect their employees from the physical dangers of

railroad work. Under a zone of danger test, those employees who do not suffer a physical impact, but who are within the zone of danger of such an impact, may be able to recover for their genuine emotional distress from the breach of this preexisting duty.

Thus, the zone of danger test takes into account the broad remedial purpose of the FELA by recognizing emotional distress as a cognizable injury under the FELA and, accordingly, is consistent both with common law developments and with *Urie v. Thompson*, 337 U.S. 163 (1949), where this Court looked to the FELA's broad remedial purpose in recognizing silicosis as a type of injury covered by the statute. However, the zone of danger test also contains liability in a manner consistent with a railroad employer's statutory duty, in recognition of the countervailing policies that also must be considered in determining the parameters of an employer's duty.

II. THE POLICIES THAT SUPPORT RESTRICTING RECOVERY UNDER THE COMMON LAW FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS REMAIN VALID AND APPLY WITH AT LEAST EQUAL FORCE TO THE FELA.

Because of this Court's instruction in *Buell*, 480 U.S. at 568, to "glean[] guidance from common-law developments" in evaluating negligent infliction of emotional distress claims under the FELA, both Conrail and amici have described the profound policies motivating the common law's limitation of the tort of negligent infliction of emotional distress. Carlisle completely ignores these policies; Gottshall asserts that all but one of them have been discredited and that the remaining policy does not apply to the FELA. Gottshall is wrong on both counts.

While erroneously asserting that most of the common law policies have been discredited (a point discussed *infra*), Gottshall concedes, as he must, that the pervasive common law concern with unlimited liability that has prompted many courts to restrict recovery for negligent infliction of emotional distress remains "justified." Gottshall Brief at 27. This is a critical concession because the fundamental problem with the court of appeals' general foreseeability test is that it does not provide any workable limits on liability for negligent infliction of emotional distress under the FELA.

In his efforts to downplay this serious problem, Gottshall makes the novel argument that "[w]hatever the potential of bystander and other 'foreseeability' tests to extend tortfeasor liability to remote and unforeseeable plaintiffs in the context of state common law, there is no such possibility in the context of the FELA." Gottshall Brief at 39-40.

However, the reasons that Gottshall offers to support this assertion are meritless. Gottshall contends, for example, that the FELA by its own terms contains the requisite limitation on liability for negligent infliction of emotional distress because the FELA applies only to railroad employees. Gottshall Brief at 40. In view of the fact that there are in excess of a quarter of a million railroad employees in the country, *see* American Association of Railroads Amicus Brief at 1, it is difficult to fathom how this "limit" is any kind of limit at all.

Perhaps more significantly, the concern with "limiting" liability is not merely a numerical one. Rather, it also involves the nature of the liability: what will trigger it; how predictable it will be; what types of people may recover. Under the court of appeals' decisions, because

the railroad employer will be liable for any emotional distress that could have been foreseen, liability will be widespread, unpredictable, and essentially without limit. Many jobs are inherently stressful, and many necessary and legitimate employment decisions, such as transfers, reprimands, terminations, promotions, and even ordinary orders from a superior, undoubtedly will cause emotional distress to some employees.

Moreover, Gottshall's argument that under the facts of his case only employees actually present on the job site could recover for emotional distress, Gottshall Brief at 42-43, far from being self-evident from the decisions is, in fact, inconsistent with the general foreseeability approach adopted by the court of appeals. It surely is as "foreseeable" that Gottshall would have suffered emotional distress had Gottshall been working on a different job site and learned of the circumstances of Johns' death as it was "foreseeable" that Gottshall would suffer emotional distress working on the same job site. In addition, by focusing solely on his particular fact pattern, Gottshall ignores the myriad of emotional distress cases that could be brought under the *Gottshall* holding, such as the court of appeals' very first application of *Gottshall* in *Carlisle*, where a train dispatcher was permitted to recover for workplace stress.

Gottshall further attempts to contain the radical ramifications of the court of appeals' general foreseeability test by pointing to "an FELA plaintiff's burden of proving traditional negligence elements of duty, breach of duty, causation and injury" as providing appropriate limits. Gottshall Brief at 39. However, common law courts have refused to adopt expansive foreseeability tests for negligent infliction of emotional distress despite the fact that

some courts have stated that the burden of proving causation is less under the FELA than it is under the common law. *See, e.g., Gottshall,* App. at A-27. Thus, the reduced burden under the FELA clearly does *not* provide a meaningful limit on FELA negligent infliction of emotional distress claims. To the contrary, it provides all the more reason to limit such claims under the FELA.

Similarly unconvincing is Gottshall's contention that the court of appeals' adoption of a foreseeability test actually imposes a limited duty because, due to their different psychological make-ups, "few railroad employees will suffer the type of serious emotional injuries necessary to expose carriers to large liability awards." Gottshall Brief at 43. Damage awards under the FELA – and indeed under any negligence system – are intended to encourage defendants to alter their behavior to avoid further adverse awards. *See* Conrail Brief at 36-37, 42. Gottshall's suggestion that emotionally fragile employees should be permitted to recover under the FELA would force employers to conform their conduct to the possible reaction of the most emotionally fragile of their employees. *See* Conrail Brief at 24-25. Accordingly, far from having a limited effect, recognition of such a duty would impact upon all employees and all of the employer's operations. For this reason, a railroad's liability under a federal statute enacted to promote railroad safety should not depend on factors totally outside of the railroad's control such as the emotional sensibility of any particular employee.

Moreover, Gottshall simply is wrong that the common law policy considerations other than the concern

with unlimited liability have been discredited. While recognizing that they may not be insurmountable, numerous courts and commentators continue to credit the policies traditionally offered for limiting the tort of negligent infliction of emotional distress, including the potential for fraudulent claims, the fear of a flood of lawsuits, and the concern that medical science is ill-equipped to determine causation and damages. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 424 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991); *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559, 566 (La. 1990); *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 132, 605 N.E.2d 805, 807 (1993); *see also* Crump, *Evaluating Independent Torts Based Upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 Ariz. L. Rev. 439, 465-76 (1992); Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 Wash. L. Rev. 1, 15-17 (1992).[2]

In addition to the policies discussed by Gottshall, a number of other policies inform the common law's reluctance to allow broad recoveries for emotional distress,

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[2] This Court has recognized very similar policies in the context of establishing the reach of other federal statutes where congressional intent was vague. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2763-65 (1991); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-44 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-48 (1975). Significantly, this Court imposed restrictions on the scope of a plaintiff's rights in each of these cases despite the fact that the securities laws and the antitrust laws – like the FELA – have broad remedial purposes. *See, e.g., Blue Chip Stamps*, 421 U.S. at 748 (securities laws); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (antitrust laws), *quoted in Illinois Brick*, 431 U.S. at 748-49 (Brennan, J., dissenting).

including: (1) the inability of monetary damages to redress emotional injuries, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 665, 771 P.2d 814, 828-29, 257 Cal. Rptr. 865, 878-79 (1989); (2) the concern that defendants more efficiently can conform their conduct to avoid physically injuring plaintiffs than they can conform their conduct to meet the emotional demands of others, *see, e.g.*, Crump, *supra* p. 11, at 461; (3) the view that in a civilized society, emotional distress may be a more appropriate subject for instruments of social control other than the law, *see, e.g.*, Product Liability Advisory Council, Inc. Amicus Brief at 6-7 (citing Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936)); and (4) the fear of over deterrence of beneficial conduct resulting from the compensation of emotional distress claims, *see, e.g.*, Crump, *supra* p. 11, at 461-62.

Thus, in considering the scope of a cause of action for negligent infliction of emotional distress under the FELA, this Court should consider all of the common law policies discussed in Conrail's opening brief and the briefs of the amici. These policies counsel against a limitless foreseeability test for negligent infliction of emotional distress and in favor of an approach such as the zone of danger test that consistently and fairly balances all of the interests at stake.

III. RESPONDENTS' ATTEMPTS TO DEFEND THE COURT OF APPEALS' DECISIONS AS ROOTED IN THE COMMON LAW ARE UNFOUNDED.

Despite their rhetoric concerning the broad remedial purpose of the FELA and the inapplicability of the common law policies restricting liability for emotional distress, both respondents strain to demonstrate that they

may recover under recognized common law theories and, thus, that the court of appeals' holdings actually are narrowly circumscribed. However, the fact is that the court of appeals itself recognized that respondents could not recover under the common law; it was this recognition that prompted it to "discard[]" all of the traditional common law limitations. *See Gottshall*, App. at A-30. Respondents' attempts now to fit their claims into clearly inapplicable common law theories only emphasize that they, too, recognize that by "discard[ing]" the common law tests in favor of a general foreseeability test, the court of appeals simply extended liability too far.

Gottshall persists in defending the court of appeals' decision that he was entitled to recover for emotional distress as having a "solid basis" in the common law, arguing that his circumstances satisfy not one, but at least three, common law tests. Gottshall Brief at 29-34.[3] Gottshall first contends that he could recover pursuant to the common law bystander test. *See* Gottshall Brief at 30 &

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[3] Gottshall's suggestion that the court of appeals found a "solid basis" in the common law permitting him to recover, Gottshall Brief at 29-30, is misleading. The court of appeals devoted over ten pages of its opinion to explaining why it would *not* rely on the common law in evaluating FELA negligent infliction of emotional distress claims. *Gottshall*, App. at A-24 to A-35. In explaining its newly created test in FELA cases, it then stated that, in determining whether the facts "provide a threshold assurance that there is a likelihood of genuine and serious emotional injury," "one consideration is whether plaintiff has a 'solid basis in the present state of common law to permit him to recover.' " *Id.* at A-35, A-36 (citation omitted). Subsequently, the court determined that the factual circumstances of Gottshall's case satisfied certain selected elements of the common law bystander test and thus helped to provide a "threshold assurance" of genuineness, even though Gottshall could not have recovered under the common law.

n.14. However, it is absolutely clear that the common law does not allow recovery for emotional distress caused by witnessing the death of a close friend. Indeed, one of Gottshall's cases, *Dunphy v. Gregor*, 261 N.J. Super. 110, 123, 617 A.2d 1248, 1255 (App. Div. 1992), although urging flexibility with respect to the familial relationship prong of the bystander test, specifically cautions against providing a remedy for the ordinary emotional distress suffered by friends of an injured or deceased victim. This conclusion is consistent with that of other courts that specifically have rejected recovery by friends for their emotional distress as bystanders. *See, e.g., Dierker v. Gypsum Transp., Ltd.*, 606 F. Supp. 566, 568 (E.D. La. 1985); *Kately v. Wilkinson*, 148 Cal. App. 3d 576, 579, 195 Cal. Rptr. 902, 903 (1983).

Gottshall's attempt to contain and defend the court of appeals' decision as satisfying the common law zone of danger test, Gottshall Brief at 32, likewise is unavailing. It is clear that the zone of danger test requires a threat of an actual physical impact, not merely a generalized risk of a physical injury. *See, e.g., Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 425 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991); *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *see also Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 555-56, 457 N.E.2d 1, 5, 75 Ill. Dec. 211, 215 (1983); *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980); Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 489 (1982). Gottshall's attempt to rephrase the zone of danger test in such a manner as to eliminate the physical impact requirement completely destroys its utility as a limitation on an employer's liability.

Gottshall also relies on what he terms the "active participant" test. Gottshall Brief at 31. However, the so-called "active participant" test is not a common law test at all, but, rather, finds its source in a single district court FELA decision. *See Althoff v. Consolidated Rail Corp.*, No. 87-4384, 1988 WL 61734 (E.D. Pa. June 13, 1988). *Althoff* is the only court ever to have permitted recovery on an "active participant" theory; indeed, similar theories have been rejected by common law courts. *See, e.g., Huggins v. Longs Drug Stores California, Inc.*, 6 Cal. 4th 124, 132-33, 862 P.2d 148, 24 Cal. Rptr. 2d 587, 592-93 (1993); *Kennedy v. McKesson Co.*, 58 N.Y.2d 500, 506, 448 N.E.2d 1332, 1335, 462 N.Y.S.2d 421, 424 (1983). In any event, Gottshall in fact is not an "active participant" in the *Althoff* sense because he did not cause his co-worker's death as did the *Althoff* plaintiff, who operated a crane that released a piece of timber that killed a co-worker.[4]

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[4] Elsewhere in his brief, Gottshall asserts that a minority of states applies either a physical manifestation or a general foreseeability test for negligent infliction of emotional distress. *See* Gottshall Brief at 23-24. However, much of the authority that Gottshall cites does not ultimately support his contention. For instance, Gottshall includes cases from California, Maine, Missouri, and Washington in these two fringe categories of negligent infliction of emotional distress cases. However, subsequent cases in each of these jurisdictions severely curtailed the broadest implications of the cases he cites. *See* Conrail Brief at 39-40 (discussing retreat in California); *see also Cameron v. Pepin*, 610 A.2d 279 (Me. 1992); *Asaro v. Cardinal Glennon Mem. Hosp.*, 799 S.W.2d 595 (Mo. 1990); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990). Thus, the minority position that Gottshall portrays as the progressive approach to negligent infliction of emotional distress claims actually is falling more and more out of favor as courts realize that such broad tests do not place adequate limits on a defendant's liability.

Like Gottshall, respondent Carlisle struggles mightily to defend the court of appeals' result as being in accordance with the common law. Carlisle, however, devotes virtually his entire brief to the proposition that common law negligent infliction of emotional distress precedent relied on by the court of appeals and discussed in Conrail's opening brief is inapposite because he is the "direct victim" of the alleged negligence. Presumably, according to Carlisle, the court of appeals' general foreseeability test applies only in such "direct victim" cases, thereby providing the necessary limit on negligent infliction of emotional distress claims.

The problem with Carlisle's approach is that the direct victim theory is a theory that the court of appeals never even mentions, much less relies upon; that has been criticized as analytically unsound; that never has been applied in FELA cases; that, at best, is a minority view applied in certain limited circumstances not applicable here; and that has been restricted even in California – the state upon which Carlisle primarily relies and the state that has had the most experience with the theory.

Carlisle's contention that there are two lines of precedent, one for bystanders and another for direct victims, and that Conrail improperly has relied on the bystander line of authority, Carlisle Brief at 13-14, is quite remarkable. Indeed, to make this argument, Carlisle completely misstates Conrail's argument by asserting that Conrail relies upon a bystander line of authority. *Id.* at 13. However, Conrail maintains that only those employees in the zone of danger of physical impact – not bystanders – should be able to bring claims under the FELA. It is difficult to see how Carlisle can deny that persons within the zone of danger are direct victims in view of the fact

that the basis of the cause of action for persons within the zone of danger is their "direct" fear of being hit. *See* Conrail Brief at 20-21. Such injuries are not "indirect" as compared to bystander cases where plaintiffs recover for their distress at seeing *another* person harmed.

Moreover, even in pure bystander cases, the distinction that Carlisle attempts to draw collapses. As one commentator has recognized:

> Under the bystander theory, liability is based on the defendant's ability to foresee that his conduct will cause the *bystander* himself to suffer emotional distress. And a "direct victim" of negligence presumably is any plaintiff who suffers unintentionally caused, foreseeable emotional distress. Therefore, a "bystander" plaintiff, once again, is simply one kind of "direct victim."

Crump, *supra* p. 11, at 464; *see also* Pearson, *supra* p. 14, at 515 (criticizing the distinction between "bystanders" and "direct victims" as "analytically unsound").

Thus, defining a plaintiff to be a "direct victim" does not and cannot justify the imposition of a broad and limitless duty on a defendant to protect a plaintiff from foreseeable emotional distress. *See Boyles v. Kerr*, 853 S.W.2d 593, 597 (Tex. 1993). The case law of California upon which Carlisle relies is instructive because – in cases not cited by Carlisle – California in fact has retreated from the distinction that it initially drew between "direct victims" and bystanders.

One of the principal cases that Carlisle relies upon for the distinction between the bystander and direct victim theories is *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980). However, in *Thing v. La Chusa*, 48 Cal. 3d 644, 656, 771 P.2d 814, 831, 257 Cal. Rptr. 865, 872

(1989) (a case not cited by Carlisle), the California Supreme Court severely criticized the *Molien* "direct victim" theory as giving "[l]ittle consideration . . . to the importance of avoiding the limitless exposure to liability." Subsequent cases in California have made clear that the direct victim theory may not be relied upon to create a tort duty in the absence of presence in a zone of danger, satisfaction of the bystander requirements, or the presence of some other legally-imposed duty.

Thus, in *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1074, 831 P.2d 1197, 1201-02, 9 Cal. Rptr. 2d 615, 619-20 (1992), the court recognized that a duty could arise to protect a "direct victim," but concluded that the source of that duty was the physician-patient relationship between Burgess and her doctor. Just a few months ago, emphasizing that the source of the duty in *Burgess* was limited to the special nature of the physician-patient relationship, the California Supreme Court held that a pharmacist did not owe a duty to an infant's parents for their emotional distress caused by the pharmacist's mislabelling of a drug prescribed to the infant. *Huggins v. Longs Drug Stores California, Inc.*, 6 Cal. 4th 124, 131-32, 862 P.2d 148, 24 Cal. Rptr. 2d 587, 591-92 (1993).[5]

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[5] In addition to the California cases, Carlisle cites section 436(1) of the *Restatement (Second) of Torts* as evidence of the existence of a broad tort duty owed to "direct victims." *See* Carlisle Brief at 14. He does not, however, cite any cases or other authorities that interpret section 436(1) to allow a broad tort duty to protect "direct victims" from emotional distress or to permit employees to recover for emotional distress arising from the general stresses of their jobs. In fact, the cases rarely discuss section 436(1) at all. This absence of case law may be because the American Law Institute adopted the Restatement in 1965, three years before the California Supreme Court decided *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), and,

The employer-employee relationship is not sufficiently similar to the doctor-patient relationship to support a general duty for an employer to protect employees from emotional distress. Unlike a doctor whose duty is to care for the well-being of the patient, the employer in no sense can be said to undertake such a broad duty to care for employees. Also unlike a doctor who makes individualized decisions with respect to each patient, an employer often must make general policy decisions applicable to all of its employees. Finally, the employer-employee relationship is not one that should support an independent duty of the employer to protect its employees from emotional distress, particularly where Congress already has defined the duty, and where at common law the courts have shied away from imposing such a duty. *See supra* pp. 4-6.

In short, both respondents implicitly concede the importance of limits on recovery for negligent infliction of emotional distress by attempting to force the factual circumstances of their cases into common law tests that do not apply or do not exist. As a result, the limits to which they point are wholly illusory. As set forth in Conrail's opening brief and further articulated here, the proper standard for negligent infliction of emotional distress under the FELA – the one that most accords with the purposes of the FELA; with the development of the common law; with the pre-existing duty that railroad employers owe their employees to protect them from the physical dangers of railroad work; and with the realities of the employment relationship – is the zone of danger test.

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thus before the courts had any real experience with the dangers of a broadly-defined tort of negligent infliction of emotional distress.

CONCLUSION

For all of the foregoing reasons and those set forth in its opening brief, petitioner Consolidated Rail Corporation respectfully requests that, as to *Consolidated Rail Corporation v. Gottshall*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions to affirm the district court's entry of summary judgment for Conrail; and, as to *Consolidated Rail Corp. v. Carlisle*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions for the court of appeals to remand to the district court with instructions to enter judgment as a matter of law for Conrail.

Respectfully submitted,

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